Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WALKER LOUISIANA PROPERTIES, J. ORAN RICHARD AND GAME MANAGEMENT, INC.,

Petitioners,

v.

STEVEN BROUSSARD,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Louisiana state court permanently enjoined Petitioners from operating their helicopters in a manner consistent with FAA regulations by restricting the altitude at which Petitioners could fly their helicopters over Respondent's property. Despite the fact that the aircraft were being operated in complete compliance with FAA regulations, within navigable public airspace, and without any hazard to persons or property on the ground, the court enjoined Petitioners from flying over Respondent's rural property at altitudes under 1000 feet during waterfowl hunting season each year, on the grounds that the noise disturbed the wild waterfowl and adversely affected Respondent's use and enjoyment of his property for hunting.

The following important question arises from these facts:

> Does a state court have the authority and jurisdiction to regulate the use of navigable airspace, altitude of aircraft in flight, aircraft noise and aircraft routes, where aircraft are being operated in complete compliance with FAA regulations, within navigable public airspace and without any hazard to persons or property on the ground?

RULE 14(b) STATEMENT

All parties in the lower courts are listed in the caption of this case.

RULE 29.6 STATEMENT

There are no parent companies or publicly held companies owning 10% or more of Petitioners' stock.

CERTIFICATE OF INTERESTED PERSONS

The following persons and entities have an interest in this suit:

1. J. Oran Richard, Petitioner;
2. Walker Louisiana Properties, Petitioner;
3. Game Management, Inc., Petitioner;
4. Robert A. Arceneaux, Counsel for Petitioners;
5. Lee A. Archer, Counsel for Petitioners;
6. Steven Broussard, Respondent;
7. Broussard & Hart, L.L.C., Counsel for Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Walker Louisiana Properties, J. Oran Richard and Game Management, Inc., respectfully request that a writ of certiorari issue to review the judgment of the Louisiana Third Circuit Court of Appeal in this case, discretionary review of which was denied by the Louisiana Supreme Court.

OPINIONS BELOW

The decision of the Louisiana Supreme Court denying discretionary review of the Court of Appeal's decision (App. 1) is reported at 825 So.2d 1175. The Louisiana Court of Appeal's decision (App. 2) is reported at 813 So.2d 487. The decision of the District Court (App. 10) is unreported.

JURISDICTION

The decision of the Louisiana Supreme Court denying discretionary review of the Court of Appeal's judgment was rendered on September 20, 2002. The jurisdiction of this Court is proper under 28 U.S.C. § 1257 and Rule 13.1 of the Rules of this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8, cl. 3

United States Constitution, Art. VI, cl. 2

49 U.S.C. § 40102(30)

49 U.S.C. § 40103

49 U.S.C. § 41713

49 U.S.C. § 46101

Title 14, Code of Federal Regulations, § 91.119

Title 14, Code of Federal Regulations, § 13

Louisiana Civil Code article 477

Louisiana Civil Code article 490

(See Appendix, App. 16-29, for Text)

STATEMENT OF THE CASE

Helicopters are used as a primary mode of transportation for oilfield and offshore oil exploration and development, as well as for land management activities, in southwestern Louisiana. In the instant case, Petitioners, using the shortest and most direct route, occasionally fly their helicopters over Respondent's rural property, for the purpose of transporting game hunters, checking for poachers, managing cattle, and other commercial and land management activities on their adjacent property. II Tr. 489, 521. Petitioners must fly reasonably low over the Respondent's adjacent property to make a safe approach to land. II Tr. 483.

It was undisputed at the trial of this matter that the helicopters in question were operated within navigable public airspace and in complete accord with federal FAA regulations. The helicopters were never flown in an unsafe manner or at an unsafe height, or in any manner that was hazardous to persons or property on the ground. Among

the numerous witnesses that testified, not one suggested that Petitioners were flying in a hazardous or unsafe manner. Respondent's own witnesses stated that they had never seen Petitioners flying in an unsafe manner or at an unsafe height. III Tr. 521. Nor did the courts find that the helicopters were operated in an unsafe manner or at an unsafe height or with any **hazard** to persons or property on the surface.

Respondent, Mr. Broussard, however, contended that the helicopter **noise** frightened the wild waterfowl and thus disturbed his hunting activities.[1] Indeed, the basis for the court's injunction was that the helicopter **noise** was disturbing wild waterfowl, which is not Mr. Broussard's property, and interfered with his right to use and enjoy his property for hunting.

Proceedings Below

To Petitioners' knowledge, Respondent never filed a complaint with the FAA regarding low-flying aircraft. Rather, his claim for injunctive relief was raised in a reconventional demand to Petitioners' suit seeking a right of passage to an enclosed estate, after Respondent changed the locks on a gate and denied road access to Petitioners' adjacent property.

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[1] The overwhelming weight of the testimony indicated that the helicopters did not unduly frighten the wild water fowl or in any way adversely affect hunting on the property. III Tr. 522, 526, 559, 565, 584, 594-596. Mr. Broussard, however, felt that "if you scare one bird away, it's adverse." III Tr. 583.

Petitioners, citing the United States Constitution and federal law, filed exceptions of no cause of action and no right of action in the trial court, urging that under federal law, Respondent had no right or cause of action to obtain injunctive relief to prohibit helicopter flights over his property. Trial court opinion, App. 10-11. Also at issue was whether the court had the authority and jurisdiction to issue injunctive relief in connection with alleged low-flying aircraft. *Id.* These issues were determined after trial on the merits.

In granting the injunction, the trial court held, without citation to any authority, that "Louisiana courts have the authority and jurisdiction to issue injunctions to prevent low flying aircraft from interfering with the use and enjoyment of the land by its owners." App. 11. Further, the court held, again without citation of authority, that "the low flying helicopters [sic] disturbance and harassment of water fowl constitutes a violation of both federal and state law." *Id.*

The court of appeal, citing articles 477 and 490 of the Louisiana Civil Code, which are general articles relating to property ownership (See, App. 28-29) agreed. Although the court of appeal cited pertinent provisions of applicable FAA regulations regarding fixed-wing aircraft (but not helicopter) altitude, amazingly, the court thereafter stated, "Federal Aviation Act regulations are not at issue in the instant matter." App. 8. The court proceeded to decide the matter based on general principles of property law.

The court of appeal affirmed the permanent injunction restricting the altitude at which Petitioners may operate helicopters over Respondent's rural hunting property, limiting such flights to altitudes under 1000 feet for the

duration of waterfowl hunting season each year, on the grounds that the noise disturbed the wild waterfowl and thus violated Respondent's right to use and enjoy his property.

Thereafter, Petitioners timely submitted an Application for Writs to the Louisiana Supreme Court, seeking discretionary review of the decision of the court of appeal and the district court, raising all the errors set forth herein. Nevertheless, on September 20, 2002, the Louisiana Supreme Court denied Petitioners' application, without providing reasons. App. 1. As such, the decision of the Louisiana Court of Appeal has become final.

REASONS FOR GRANTING THE WRIT

The state court clearly erred in holding that Louisiana courts have the authority and jurisdiction to issue injunctions to regulate navigable airspace, altitude of aircraft in flight, aircraft noise and aircraft routes, particularly in a case where the aircraft were being operated in complete compliance with FAA regulations, within navigable airspace, and without any hazard to persons or property on the ground.

The state court decision enjoining Petitioners from operating helicopters over Respondent's property at altitudes of less than 1000 feet is in direct conflict with federal law and FAA Regulations, violates the Supremacy Clause and the Commerce Clause, is invalid as preempted under federal law and FAA regulations regarding navigable airspace, control of aircraft in flight, noise control and aviation routes, and conflicts with decisions of this Court, other federal courts and other state courts of last resort.

Moreover, the grant of injunctive relief prohibiting use of the navigable public airspace of the United States was clearly inappropriate and unauthorized under federal law, and conflicts with decisions of this Court and other state supreme courts.

Furthermore, considering that the FAA has an administrative program to handle citizen complaints regarding low-flying aircraft and to issue cease and desist orders, which Respondent did not pursue, the court's exercise of jurisdiction to issue an injunction was also clearly inappropriate under federal law.

Finally, as a policy matter, if permitted to stand, this decision will affect the safe and efficient provision of helicopter support to Louisiana's energy and land industries. Particularly in the winter months, during inclement weather or when visibility is poor, helicopters must fly at altitudes lower than 1000 feet.

The decision sets a harmful precedent under which the state courts may create numerous "no fly zones" all over the state. Even now, landowners who have become aware of the decision have contacted counsel involved in this case, intending to file similar suits seeking injunctions against over-flights by aircraft that they find annoying.

Furthermore, given the present climate after the tragic events of September 11, 2001, there is a compelling need to ensure centralized federal regulation over all aspects of aviation. The decision of the Louisiana court is contrary to that goal.

Accordingly, Petitioners respectfully urge this Court to grant the Writ, and after due proceedings, reverse the decision of the Louisiana state court.

I. THE STATE COURT DECISION ENJOINING HELICOPTER FLIGHTS BELOW 1000 FEET OVER RESPONDENT'S PROPERTY VIOLATES THE SUPREMACY CLAUSE AND THE COMMERCE CLAUSE AND CONFLICTS WITH THE JURISPRUDENCE, MERITING A WRIT.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2

In *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985), this Court observed: "It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2 invalidates state laws that 'interfere with, or are contrary to,' federal law. . . . " *Id.*, 471 U.S. at 712.

Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. *Id.*, 471

U.S. at 712. In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Preemption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.*, 471 U.S. at 712-13.

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, 471 U.S. at 712-13.

This Court has held repeatedly that state laws can be preempted by federal regulations as well as by federal statutes. *Id.*, 471 U.S. at 713. Moreover, it is not only state **laws** that are preempted, but also judicial decisions. The Supremacy Clause states ". . . the Judges in every State shall be bound thereby. . . ." U.S. Const., Art. VI, cl. 2. State courts are not immune from the Supremacy Clause. *Machesky v. Bizzell,* 414 F.2d 283 (5th Cir. 1969).

As discussed in the following section, the lower court's decision issuing a permanent injunction enjoining Mr. Richard from flying his helicopter at altitudes of under 1000 feet from September to the end of waterfowl season is preempted by federal law and Federal Aviation Administration Regulations regarding navigable airspace, aircraft

in flight, noise control and aviation routes, and violates the Supremacy Clause and the Commerce Clause, meriting a writ.

II. THE STATE COURT DECISION ENJOINING HELICOPTER FLIGHTS BELOW 1000 FEET OVER RESPONDENT'S PROPERTY IS PREEMPTED BY FEDERAL LAWS AND FAA REGULATIONS REGARDING NAVIGABLE AIRSPACE, AIRCRAFT IN FLIGHT, NOISE CONTROL AND AVIATION ROUTES, AND CONFLICTS WITH THE JURISPRUDENCE, MERITING A WRIT.

By virtue of the Commerce Clause, U.S. Const., Art. 1, § 8, cl. 3, the United States Congress has paramount control over aviation. *Aircraft Inv. Corp. v. Fisher Flying Service, Inc.*, 183 So.2d 441, 443 (La. App. 1966), *writ denied*, 249 La. 374, 186 So.2d 626 (1966). As the courts have noted, "It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." *Fiese v. Sitorius*, 247 Neb. 227, 230-231, 526 N.W.2d 86, 89 (Neb. 1995); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 232 (E.D. N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017, 89 S.Ct. 620, 21 L.Ed.2d 561 (1969).

Under Federal Aviation law, "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 626-627, 93 S.Ct. 1854, 1856, 36 L.Ed.2d 547 (1973). The regulation and management of the navigable air space and aircraft in flight is under the complete and

exclusive control of the Federal Government, exercised by the Federal Aviation Administration (FAA). *Id.* [2]

A. Applicable Law And Regulations

Federal Aviation law, in 49 U.S.C. § 40103(a) provides: "(1) The United States Government has exclusive sovereignty of airspace of the United States. (2) A citizen of the United States has a public right of transit through the navigable airspace. . . ." *Id.*

Pursuant to 49 U.S.C. § 40102(30), "navigable airspace" is defined as "airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(30).

49 U.S.C. § 40103(b)(1) reads, in pertinent part: "The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the **navigable airspace** and assign by regulation or order the use of the **airspace** necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1) (emphasis added).

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[2] Although he dissented in *City of Burbank, supra,* Chief Justice Rehnquist agreed with the majority on the issue of federal preemption, noting that "Congress clearly intended to preempt the States from **regulating aircraft in flight**. . . . " 411 U.S. at 644, 93 S.Ct. 1854 (emphasis added).

49 U.S.C. § 40103(b)(2) provides as follows:

> The Administrator shall prescribe air traffic regulations on the flight of aircraft (**including regulations on safe altitudes**) for –
>
> (A) navigating, protecting, and identifying aircraft;
>
> (B) **protecting individuals and property on the ground**;
>
> (C) using the navigable airspace efficiently; and
>
> (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 40103(b)(2) (emphasis added).[3]

The FAA implementing regulations regarding safe altitudes, contained in Title 14, Code of Federal Regulations, Section 91.119, General Operating and Flight Rules, provide:

> **§ 91.119 Minimum safe altitudes: General.**
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

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[3] In regard to preemption, 49 U.S.C. § 41713 expressly states: (b) Preemption. – (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, **route**, or service of an air carrier that may provide air transportation under this subpart. 49 U.S.C. 41713(b)(1). The plain language of 41713(b)(1) expressly prohibits states from regulating aviation rates, **routes**, or services.

> *(a) Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> *(b) Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> *(c) Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> ***(d) Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.** (emphasis added).

According to an official FAA website discussing citizen complaints of low-flying aircraft under the foregoing Regulations, "Helicopter operations may be conducted below the minimum altitudes set for fixed-wing aircraft. The reason? The helicopter's unique operating characteristics, the most important of which is its ability to execute pinpoint emergency landings during power failure. Further, the helicopter's increased use by law enforcement and emergency medical service agencies requires added flexibility in the application of many FAA provisions." See, FAA website, http://www.faa.gov/fsdo/hou/Low.htm.

The foregoing FAA regulations "do not limit helicopter minimum altitudes to the navigable airspace for fixed-wing aircraft, but allow them to fly as low as safety considerations permit." *Pew v. Scopino*, 904 F. Supp. 18, 25 (D.C. Me. 1995), *reconsideration denied*, 161 F.R.D. 1 (D.C. Me. 1995). As this Court observed in *Florida v. Riley*, 488 U.S. 445, 451-452, 109 S.Ct. 693, 697, 102 L.Ed.2d 835 (1989), "[H]elicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft." *Id.*

> While Federal Aviation Administration regulations permit fixed-wing-aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas, helicopters may be operated at less than the minimums for fixed-wing-aircraft "if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the [FAA] Administrator." 14 CFR § 91.79 (1988).

Florida v. Riley, supra, 488 U.S. 445, 451-452, n. 3.

Courts have correctly concluded, based on FAA regulations and Congress' definition of navigable airspace, that as to helicopters, all airspace is "navigable airspace." See, e.g., *Com. v. Oglialoro*, 525 Pa. 250, 260, 579 A.2d 1288, 1293 (Pa. 1990), wherein the Pennsylvania Supreme Court concluded that a helicopter at an altitude of 50 feet was in "navigable airspace." Since helicopters are permitted to fly at any altitude under FAA regulations, the Court observed, all air space is navigable and the public is permitted to travel in this space. See also, *Moss v. State,* 878 S.W.2d 632 (Tex. App. 1994), *discretionary review refused*

(1994) (helicopter at altitude of 100 feet was in navigable public air space).

B. The State Court Decision Impermissibly Regulates Use Of Navigable Airspace And Aircraft In Flight.

In the instant case, the state court's injunction impermissibly regulates Petitioners' use of navigable airspace and aircraft in flight in a manner directly contrary to FAA Regulations, permitting helicopters to fly as low as safety considerations permit. Numerous decisions have held similar attempts to regulate the use of navigable airspace preempted under pervasive federal law.

In particular, with respect to the regulation of navigable airspace, the courts have noted: "Congress has legislated so pervasively that state provisions inhibiting that regulation, whether in the form of legislation or judicial decision, must be declared invalid under the supremacy clause." *Fiese v. Sitorius*, *supra*, quoting *United States v. City of New Haven,* 367 F. Supp. 1338, 1340 (D. Conn. 1973), *aff'd*, 496 F.2d 452 (2d Cir. 1974), *cert. denied*, 419 U.S. 958, 95 S.Ct. 218, 42 L.Ed.2d 174 (1974).

Pertinent decisions include *Lockheed Air Terminal, Inc. v. City of Burbank,* 318 F. Supp. 914 (C.D. Cal. 1970), *aff'd*, 457 F.2d 667, *aff'd*, 93 S.Ct. 1854, 411 U.S. 624, 36 L.Ed.2d 547 (1973) (Federal government has so preempted fields of use of airspace and regulation of air traffic as to invalidate and preclude enforcement of city ordinance prohibiting takeoff by jet aircraft from airport between hours of 11:00 P.M. and 7:00 A.M.); *American Airlines, Inc. v. City of Audubon Park, Ky.,* 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306, *cert. denied*, 90 S.Ct. 78, 396

U.S. 845, 24 L.Ed.2d 95 (1969) (ordinance making it unlawful to fly any aircraft over corporate limits of city at a height of less than 750 feet was unconstitutional as being in conflict with statutes adopted by Congress pursuant to its power under commerce clause and with regulations promulgated by Federal Aviation Administration and Department of Transportation pursuant to such statutes).

As such, the ruling in this case regulating Petitioners' use of navigable airspace and dictating the altitude of aircraft in flight was clearly invalid and preempted under Federal law, and in conflict with the jurisprudence, meriting a writ.

C. The State Court Decision Impermissibly Regulates Aircraft Noise.

Moreover, the Louisiana court's decision in this case, which was primarily based on the conclusion that the **noise** from the helicopter was disturbing the wild waterfowl, may also be viewed as an impermissible attempt to regulate aircraft **noise**, which numerous courts, including this Court, have held preempted by federal legislation and regulations. See, *City of Burbank v. Lockheed Air Terminal Inc., supra,* 411 U.S. 624, 93 S.Ct. 1854 (Federal Aviation Administration, in conjunction with the Environmental Protection Agency, has full control over aircraft noise, preempting state and local control); *United States v. City of Blue Ash, Ohio,* 487 F. Supp. 135 (D.C. Ohio 1978), *aff'd*, 621 F.2d 227 (6th Cir. 1980) (municipal ordinance that manages or dictates action by aircraft in navigable airspace for the purpose of noise control, is invalid under the preemption doctrine); *American Airlines, Inc. v. Town of Hempstead,* 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 89 S.Ct.

620, 393 U.S. 1017, 21 L.Ed.2d 561 (1969) (town's noise ordinance was invalid where it was in direct conflict with valid applicable regulations of FAA where compliance with ordinance would require alternation in flight patterns and procedures).[4]

D. The State Court Judgment And The Civil Code Articles Upon Which The Court Relied Are Preempted Under 49 U.S.C. § 41713 Prohibiting The States From Regulating Aviation Rates, Routes, Or Services.

In this case, the Louisiana court held that general Louisiana Civil Code articles on property, including articles 477 and 490,[5] permitted the court to regulate use of the navigable airspace of the United States, altitude of aircraft in flight and aircraft noise.

If these articles do, as the court held, permit the courts to dictate use of the navigable airspace and the altitude of aircraft in flight over private property in Louisiana, then to that extent, these articles permit state regulation of air carrier routes and services.

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[4] There is an exception to this rule where a state or a municipality is the proprietor of an airport, but that exception does not apply in this case.

[5] La. C.C. art. 490 provides, in pertinent part: "Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it." La. C.C. art. 477 provides, in pertinent part: "Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."

Such regulation is impermissible under § 105(a)(1) of the Airline Deregulation Act of 1978, recodified in 1994 as 49 U.S.C. § 41713, which states: "(b) Preemption. – (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, **route**, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1) (emphasis added). The plain language of § 41713(b)(1) expressly prohibits states from regulating aviation rates, **routes**, or services.

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), this Court held that the preemption statute encompasses three types of state laws: (1) those specifically regulating to airlines; (2) those which indirectly regulate rates, routes, or services; and (3) those which have significant effect on rates, routes, or services, even though they are laws of general effect. *Morales,* 504 U.S. 374, 112 S.Ct. 2031. This Court observed that a state law need not be one specifically addressed to the airline industry to be preempted by the ADA as a law "relating to" the rates, routes, or services of an air carrier; the section of the ADA expressly preempting all state laws "relating to" the rates, routes, or services of any air carrier displaces all state laws that fall within its sphere. *Id.*

In *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995), this Court held that a state statute that controls the primary conduct of those falling within its governance and its application to an airline is preempted by the ADA; the ADA's preemption of state regulation does not turn on whether the matter is

"essential" or "unessential" to airline operations. *Id.*, 513 U.S. at 226. Therein, this Court held a general consumer-fraud law preempted.

State common law counts as an "other provision having the force and effect of law" for purposes of this statute. *Wolens, supra,* 513 U.S. 219, 233 n. 8; *United Airlines, Inc. v. Mesa Airlines, Inc.,* 219 F.3d 605 (7th Cir. 2000) (state common law is an "other provision having the force and effect of law" under 49 U.S.C. § 41713(b)). The court in *Mesa Airlines* also noted that **judgments** should be treated like state laws and regulations to the extent they have the same practical effect as laws and regulations. *Id.* at 607.

Under the Louisiana court's interpretation of Louisiana Civil Code articles 477 and 490 as permitting regulation of the navigable airspace, aircraft in flight and aircraft noise over private property, the articles permit state regulation of aviation routes and services. Moreover, the court's Judgment itself is a state regulation of aviation routes and services. Accordingly, both the Judgment itself, and the Civil Code articles upon which the Court relied, are preempted under 49 U.S.C. § 41713(b) and controlling decisions of this Court.

In sum, the lower court's decision in this case affirming a permanent injunction enjoining Mr. Richard from flying his helicopter at altitudes of under 1000 feet from September to the end of waterfowl season violates the Supremacy Clause and the Commerce Clause; is preempted by federal law and Federal Aviation Administration regulations regarding navigable airspace, aircraft in flight and noise control; violates the ADA preemption provision prohibiting state regulation of aviation rates,

routes, or services; and directly conflicts with decisions of this Court, other federal courts and state courts of last resort, meriting a writ.

III. THE STATE COURT DECISION ENJOINING USE OF THE NAVIGABLE PUBLIC AIRSPACE OF THE UNITED STATES VIOLATES FEDERAL LAW AND CONFLICTS WITH THE JURISPRUDENCE, MERITING A WRIT.

The trial and appellate courts concluded, without citation of authority, that they had the authority to issue an injunction prohibiting Petitioners' flights within altitudes permitted by FAA regulations, and within the navigable airspace of the United States.

This holding is in direct conflict with numerous state and federal decisions holding that federal law prohibits landowners from obtaining injunctive relief to prevent aircraft from using the navigable airspace of the United States. See, e.g., *Fiese v. Sitorius,* 526 N.W.2d 86, 247 Neb. 227 (Neb. 1995), citing *United States v. City of New Haven, supra; Town of East Haven v. Eastern Airlines, Inc.,* 331 F. Supp. 16 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972), *cert. denied*, 411 U.S. 965, 93 S.Ct. 2144, 36 L.Ed.2d 685 (1973) (landowner could not enjoin aircraft from using the airspace above the property to safely take off and land; the statutory right of freedom of transit through the navigable airspace of the United States is, in effect, a license). See, also, *Antonik v. Chamberlain,* 81 Ohio App. 465, 37 O.O. 305, 78 N.E.2d 752 (1947) (license granted to private party pursuant to federal law).

In *County of Westchester, N.Y. v. Town of Greenwich,* 227 Conn. 495, 629 A.2d 1084 (1993), the Connecticut

Supreme Court concluded that landowners "had no right of action against the plaintiff to stop the overflights because federal law prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States." 227 Conn. at 502-03, 629 A.2d 1084 citing *City of New Haven, supra,* 367 F. Supp. at 1341; *Town of East Haven v. Eastern Airlines, Inc., supra.*

The court relied on federal law contained in 49 U.S.C. § 40103, discussed *supra*, which provides that citizens of the United States enjoy a public right of freedom of transit through the navigable airspace of the United States, and that "navigable airspace" means airspace above the minimum altitudes of flight prescribed by FAA regulations.

The court of appeal in this case held that an injunction was warranted under general Louisiana property law contained in Louisiana Civil Code Articles 477 and 490, which generally provide that an owner of property is entitled to the use and enjoyment of his property, and that ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

However, this Court has indicated that flights within the navigable airspace do not constitute a trespass or impinge on the property rights of an owner of land over which the aircraft flies. See, *Laird v. Nelms,* 406 U.S. 797, 799-800, 92 S.Ct. 1899, 1901, 32 L.Ed.2d 499 (1972); quoting *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), wherein this Court said:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe – *Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern

> world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just Claim. 328 U.S., at 260-261, 66 S.Ct., at 1065.

Laird v. Nelms, supra, 406 U.S. at 799-800, 92 S.Ct. at 1901.[6]

In sum, the Louisiana court's issuance of an injunction violates federal law and conflicts with numerous state and federal decisions, including decisions by other state courts of last resort, holding that federal law prohibits landowners from obtaining injunctive relief to prevent aircraft from using the navigable airspace of the United States. Accordingly, Applicant prays that this Honorable Court grant the writ.

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[6] Although, in extreme cases, the Courts have permitted **takings** claims for **damages** against **government** entities for repeated low flights that have rendered residential property unbearable for use, see, e.g., *U.S. v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (concerning flights below navigable airspace, as then defined), those principles are inapplicable under these facts. Petitioners are not government bodies, this is not a takings case, the flights were within navigable airspace, and no tort action for damages was pursued. Respondent sought only an injunction, which is clearly prohibited.

IV. THE STATE COURT'S USURPATION OF FAA JURISDICTION TO HANDLE CITIZEN COMPLAINTS OF LOW-FLYING AIRCRAFT WAS IMPROPER AND CONTRARY TO FEDERAL LAW, MERITING A WRIT.

The lower courts in this case also stated, again without citation of authority, that they had jurisdiction to determine a citizen complaint requesting an injunction against low-flying aircraft. To the contrary, that exercise of jurisdiction usurped FAA jurisdiction.

The proper procedure to remedy Mr. Broussard's complaints regarding the alleged "abusively low-flying aircraft," would have been to file a complaint with the FAA, which has a detailed program and administrative procedures to handle such complaints. See, 49 U.S.C. § 46101(a)(1); 14 Code of Federal Regulations, Part 13, entitled "Investigative and Enforcement Procedures," and §§ 13.1 and 13.5 relating to complaints; *Pew v. Scopino*, 904 F. Supp. 18 (D.C. Me. 1995) *reconsideration denied*, 161 F.R.D. 1;[7] and FAA website, *supra*, http://www.faa.gov/fsdo/hou/Low.htm.[8]

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[7] Indeed, in *Pew*, the court stated that violation of FAA regulations provides no private right of action for landowners at all. Therein, the court found that plaintiffs whose property was subject to intrusive low-level helicopter flights during a drug eradication program did not have a private right of action for violation of air traffic rules promulgated pursuant to the Federal Aviation Act, and that citizens must file complaints with the Secretary under 49 U.S.C. § 46101(a)(1) (1994).

[8] However, Petitioners did not violate any FAA regulations, and such complaints would have been unavailing, perhaps explaining Respondent's decision to seek redress through the state courts and not through the FAA. Again, among the numerous witnesses that testified

(Continued on following page)

The courts have found that injunctive relief prohibiting the use of navigable airspace of the United States is improper on the merits, as discussed *supra*. The courts have also found that injunctive relief is procedurally improper in cases, such as this one, where the FAA has administrative procedures in place for complaints and the issuance of "cease and desist" orders, or injunctions, and the plaintiff has not followed those procedures. See, e.g., *Wills v. Trans World Airlines,* 200 F. Supp. 360, 365-366 (S.D. Cal. 1961), citing *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 767, 67 S.Ct. 1493, 1500, 91 L.Ed. 1796 (1947) (where Congress has clearly commanded that administrative judgment be taken initially or exclusively, courts have no lawful function to anticipate administrative decision with their own); and *Mortimer v. Delta Air Lines*, 302 F. Supp. 276, 282 (D.C. Ill. 1969), wherein the court noted:

> Injunctive relief is clearly inappropriate. The Federal Aviation Act provides for the filing of a complaint with the administrative agency which has the duty to investigate the matter and, where justified, issue an order compelling future compliance. . . . In the absence of the exhaustion

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in this case, not one even suggested that Petitioners or their employees were flying in a hazardous or unsafe manner or at an unsafe height. To the contrary, Max Caldarara, a respected high school head football coach who hunts game frequently in the area, and who was called by Mr. Broussard, stated that he has never seen Richard flying his helicopter in an unsafe manner or at an unsafe height. III Tr. 521. Nor did the courts find that Mr. Richard was operating his helicopter with any **hazard** to persons or property on the surface. Indeed, the basis for the Courts' injunction was that the helicopter **noise** was disturbing wild waterfowl, which is not Mr. Broussard's property.

> of the administrative remedy provided by Congress . . . this Court will not entertain any claim for equitable relief. See *Wills v. Trans World Airlines,* 200 F. Supp. at 365-366.

Mortimer v. Delta Air Lines, supra, 302 F. Supp. at 282.

Petitioners submit that pursuant to the FAA rules and regulations regarding citizen complaints of low-flying aircraft, the determination of a citizen complaint seeking an injunction against alleged low flying aircraft was a matter within the primary jurisdiction of the FAA, not the Louisiana state courts, meriting a writ.

V. IMPORTANT POLICY REASONS ALSO MERIT THE GRANT OF A WRIT.

Given the present climate after the tragic events of September 11, 2001, there is a compelling need in this country to ensure centralized federal regulation over all aspects of aviation. The decision of the Louisiana court is clearly contrary to that goal.

Moreover, on a local level, if permitted to stand, this decision will affect the safe and efficient provision of helicopter support to Louisiana's energy and land industries. Particularly in the winter months, during inclement weather or when visibility is poor, helicopters must fly at altitudes lower than 1000 feet.

The decision sets a harmful precedent under which the state courts may create numerous "no fly zones" all over the state. Even now, landowners who have become aware of the decision have contacted counsel involved in this case, intending to file similar suits seeking injunctions against over-flights by aircraft that they find annoying.

Accordingly, Petitioners respectfully urge this Honorable Court to grant the writ, and after due proceedings had, reverse the decision of the Louisiana court.

CONCLUSION

The Louisiana state court decision enjoining Petitioners from operating helicopters over Respondent's property at altitudes of less than 1000 feet is in direct conflict with federal law and FAA Regulations; violates the Supremacy Clause and the Commerce Clause; is invalid as preempted under federal law and FAA regulations regarding navigable airspace, control of aircraft in flight, noise control and aviation routes and services; and conflicts with decisions of this Court, other federal courts and state courts of last resort.

Moreover, the state court's grant of injunctive relief prohibiting use of the navigable public airspace of the United States was clearly inappropriate and unauthorized under federal law, and conflicts with decisions of this Court and other state supreme courts.

Furthermore, considering that the FAA has an administrative program to handle citizen complaints regarding low-flying aircraft and to issue cease and desist orders in appropriate cases, and that Respondent did not avail himself of those procedures, the state court's exercise of jurisdiction to issue an injunction was clearly improper under federal law.

Finally, as a matter of policy, after the tragic events of September 11, 2001, there is a compelling need in this country to ensure centralized federal regulation over all

aspects of aviation. The decision of the Louisiana court is clearly contrary to that goal.

This decision also has grave implications for the helicopter industry in Louisiana. Landowners who have become aware of the decision have already contacted counsel involved in the case, intending to file similar suits seeking injunctions against aircraft that purportedly disturb their activities. Under this decision, the courts of Louisiana could create numerous "no fly" zones all across the state.

Accordingly, Petitioners respectfully urge this Honorable Court to grant the writ, and after due proceedings had, reverse the decision of the Louisiana court in this case.

Respectfully submitted,

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December 2002

Supreme Court of Louisiana.

WALKER LOUISIANA PROPERTIES,
J. Oran Richard and Game Management, Inc.

v.

Steven BROUSSARD.

No. 2002-C-1497.

Sept. 20, 2002.

Prior Report: La.App., 813 So.2d 487.

In re Walker Louisiana Properties et al.; Richard, J. Oran; Game Management Inc.; – Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of Calcasieu, 14th Judicial District Court Div. A, No. 99-6824; to the Court of Appeal, Third Circuit, No. 01-711.

Denied.

VICTORY, J., would grant the writ.

App. 2

Court of Appeal of Louisiana,
Third Circuit.

WALKER LOUISIANA PROPERTIES,
J. Oran Richard and Game Management, Inc.

v.

Steven BROUSSARD.

No. 01-711.

March 6, 2002.
Rehearing Denied May 1, 2002.

John E. Bergstedt, Bergstedt Law Firm, Lake Charles, LA, for Plaintiff/Appellants Walker Louisiana Properties, J. Oran Richard and Game Management, Inc.

Steven Broussard, Broussard & Hart, L.L.C., Lake Charles, LA, Defendant/Appellee, In Proper Person.

Court composed of SYLVIA R. COOKS, OSWALD A. DECUIR and ELIZABETH A. PICKETT, Judges.

PICKETT, Judge.

FACTS

Walker Louisiana Properties (Walker) owns approximately 80 acres in Calcasieu Parish which is bounded on the south by the Intercoastal Waterway, on the east by the Brandon ditch, on the west by property owned by the Gray Estate and leased to J. Oran Richard, and on the north by property owned by the defendant, Steven Broussard. By letter dated August 13, 1997, Broussard gave Richard permission to use a road across Broussard's property for access to Richard's leased property outside of hunting season, provided Mr. Richard assist with road maintenance. In early 1999, following numerous complaints to

Richard regarding his failure to assist with the road maintenance, Broussard changed the locks on the gate thereby blocking Richard's access to the road.

November 4, 1999, Walker Louisiana Properties, J. Oran Richard, and Game Management, Inc., filed suit against Steven Broussard seeking a statutory right of passage across Broussard's property and damages.

Broussard filed an answer and reconventional demand seeking a temporary restraining order to enjoin Richard, his agents and employees from flying a helicopter at altitudes under 1,000 feet across Broussard's property. He further filed a Motion For Summary Judgment, seeking dismissal of Richard's request for a right of passage.

A hearing was held on the Motion For Summary Judgment on May 12, 2000. The trial court granted that motion and dismissed the demand for a statutory right of passage. Following a trial on the merits, the trial court found Walker Properties did not establish title to the right of passage sought, nor did it establish title by acquisitive prescription. The trial court denied the plaintiffs their request for a right of passage.

The trial court further found that helicopters being operated by Richard, or those acting on his behalf, were being operated in such a manner as to interfere with Broussard's right to use and enjoy his property. The trial court granted Broussard a permanent injunction prohibiting such helicopters from flying over Broussard's property at altitudes of under 1000 feet during the months of September through the end of water fowl season each year unless they are within ⅛ of a mile of Broussard's northern property line.

It is from this judgment the plaintiff appeals.

DISCUSSION

The appellant has set forth two assignments of error, as follows:

> 1) The opinions and judgments of the court on both Motion For Summary Judgment and on the Merits are contrary to law and facts in that the court held that the granting of the right of way and construction of the Brandon Ditch effectively precluded the owner or lessee of the enclosed estate from seeking and obtaining a statutory right of passage. The trial court failed or refused to consider clear evidence of the threat of appropriation, gratuitous right of passage, the custom in the area, and whether or not the "voluntary act" provision requires a conveyance or sale.
>
> 2) The judgment of the trial court is contrary to law and is beyond the authority and power of a state's district court to enter a preliminary injunction relative to the height of helicopter flights in a rural area. The trial court created a private cause of action under state law where none exists and attempts to judicially legislate in a field subject to federal law preemption.

ASSIGNMENT OF ERROR NO 1

There is no question that the subject property, owned by Walker Properties and leased to J.O. Richard and Game Management, Inc., is an enclosed estate. It has no access to a public road. This property became enclosed in 1953 when W.E. Walker (the appellant's ancestor) granted a right of way to the Calcasieu Parish Police Jury for purposes of

the parish constructing the Brandon Ditch. The "Brandon Ditch" runs along the eastern portion of the Walker property and cuts off access to the public road. This ditch was constructed by the parish, with W.E. Walker's acquiescence, for the purpose of providing drainage between the Choupique Bayou and the Intercoastal Waterway to alleviate a flooding problem in the area. This ditch benefits all the surrounding properties, including both the appellant's and the appellee's property.

La.Civ.Code art. 689 provides as follows:

> The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion.

The appellee argues, however, that the subject property became enclosed voluntarily and, therefore, Civil Code Article 693 prohibits the appellant from entitlement to a right of passage. Article 693 provides as follows:

> Art. 693. Enclosed estate; voluntary act If an estate becomes enclosed as a result of a voluntary act or omission of its owner, the neighbors are not bound to furnish a passage to him or his successors.

This code article was enacted in 1977 and became effective January 1, 1978, twenty-five years after W.E. Walker granted the right-of-way to Calcasieu Parish. At the time that the right-of-way was granted there was no such provision in law which would have denied Mr. Walker the right to seek passage across his neighbor's property to the nearest public road. The provisions of article 693 are substantive in nature. La.Civ.Code art. 6 provides, in

pertinent part, "In the absence of contrary legislative expression, substantive laws apply prospectively only." Because the subject property became enclosed prior to the enactment of this code article, it does not apply to the facts of the instant case and cannot serve to bar the appellant from seeking a passage across the neighboring property.

Further, even if art. 693 applied to the instant matter, we do not find this is the type 'voluntary act or omission' contemplated by the code article.

The Louisiana Supreme Court examined and dismissed this issue in *LeBlanc v. Thibodeaux,* 615 So.2d 295 (La.1993). In *LeBlanc* the court thoroughly reviewed the legislative intent in the enactment of this code article and determined that "The drafters apparently contemplated that article 693's exception would negate the right of passage otherwise afforded by art. 689 where the enclosure has been created by the owner's sale of his access property. . . . "

The court, however, did not address the article's applicability to voluntary acts or omissions *other than* an owner creating the enclosed estate by selling off his access property.

In the instant matter, the landowner's property was not enclosed by the *sale* of access property. It became enclosed because of the granting of a right-of-way to a public body for the construction of a work to benefit all surrounding landowners. The evidence suggests the landowner voluntarily granted this right-of-way. There is no evidence to support the idea that the parish had threatened to expropriate the property, making this matter distinguishable from *Bouser v. Morgan,* 520 So.2d 937 (La.App. 3 Cir. 11/4/87).

We find, however, that the 'voluntary act' involved in the instant matter, the granting of a right-of-way to a public body to be used for a public purpose, is not the type 'voluntary act' contemplated by art. 693, which would deprive the appellant of the right afforded him under article 689 to seek passage across the appellee's property.

Accordingly, we find the trial court erred in granting the appellee's Motion For Summary Judgment. The appellant is in fact entitled to a statutory right of passage across Mr. Broussard's property under the provisions of La.Civ.Code art. 693. We remand this matter to the trial court for the purpose of determining the location and what indemnification is due appellee.

ASSIGNMENT OF ERROR # 2

The appellant further argues that the trial court's issuance of a permanent injunction restricting the altitude at which helicopters may fly in rural areas is contrary to law and beyond the authority and power of a state district court.

In its reasons for judgment, the trial court noted that Louisiana courts have the authority and jurisdiction to issue injunctions to prevent low flying aircraft from interfering with the use and enjoyment of land by its owners. Further, the trial court found that the low flying helicopters disturbance and harassment of water fowl constitutes a violation of both federal and state law.

The appellee contends that he has a right to injunctive relief pursuant to La.Civ.Code art. 477, which provides, in pertinent part:

> The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.

We agree. The Louisiana Civil Code Article 490 provides the ownership of a tract of land carries with it the ownership of *everything that is directly above* or under it. Furthermore, the airspace may be freely used by the public for aerial traffic at reasonable altitudes. Accordingly, Congress has recognized the need for modification of the notion of private ownership of air space and declared that the airspace above the minimum altitude for safe flight is navigable airspace subject to the public right for free transit. *See* Federal Aviation Program, 49 U.S.C.A. § 1301 *et seq.* The F.A.A. has fixed the minimum safe altitude at "1000 feet above the highest obstacle" over "congested areas," and, otherwise, at "500 feet above the surface, except over open water or sparsely populated areas." 14 C.F.R. § 91.79(b), (c). Louisiana Civil Law Treatise on Property, Vol. 2, Ch. 3 § 47.

Although the airspace above the appellee's property is navigable and subject to regulation, and although helicopters are excepted from some of those regulations, Federal Aviation Act regulations are not at issue in the instant matter. In the instant case, the subject property is located in a rural area of Calcasieu Parish, and is reachable only by private road owned and maintained by the appellee, Steven Broussard, otherwise, one can reach the property by air or water. The issue we must address is whether the appellant operating his helicopter at abusively low levels, interferes with the appellee's use and enjoyment of his land. We find it does. Accordingly, pursuant to Article 490 of the Louisiana Civil Code the appellee has a right to

enjoy his property and, therefore, is entitled to injunctive relief.

We affirm the trial's [sic] court injunction prohibiting the appellant from operating helicopters at altitudes of under 1,000 feet across Broussard's property.

For the above and foregoing reasons we reverse that portion of the trial court's judgment which found that the appellee was not entitled to a statutory right of passage across Mr. Broussard's property and remand for the sole purpose of determining the location of passage and indemnity; affirm the trial court's issuance of the injunction. Costs of this appeal are assessed equally between appellant and appellees.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

WALKER LOUISIANA PROPERTIES, ETC.	:	14TH JUDICIAL DISTRICT COURT
VS. NO. 99-6824	:	PARISH OF CALCASIEU
STEVEN BROUSSARD	:	STATE OF LOUISIANA
FILED: 1-9-01	:	/s/ [Illegible]

OPINION AND JUDGMENT

Walker Louisiana Properties filed suit against Steven Broussard seeking a Statutory Right of Passage across Broussard's property pursuant to Louisiana Civil Code article 689. Broussard filed a Reconventional Demand against J. R. Richard, and others, seeking and obtaining a temporary restraining order against Richard from flying helicopters over Broussard's property at altitudes under 1000 feet; Broussard's Reconventional Demand seeks to have the temporary restraining order converted into a permanent injunction. The parties have agreed and stipulated that the temporary restraining order against Richard will remain in effect until a judgment is rendered on the merits. The parties agreed and stipulated that the trial on the merits that began on Tuesday, May 30, 2000, would be considered as trial on the merits for the permanent injunction without any necessity of a prior hearing for a preliminary injunction. Walker Louisiana Properties filed a Peremptory Exception of No Cause and/or No Right of Action claiming that Broussard had not stated a cause of action and had no right of action to obtain injunctive relief regarding helicopter flights over his property, because the sole power and authority to control the airwaves is vested with the United States pursuant to the commerce clause of the U. S. Constitution.

The Court finds that State Courts have exercised jurisdiction, including injunctive relief, in connection with low flying aircraft. Other states have enacted legislation prohibiting interference with the use and enjoyment of property by low flying aircraft. Louisiana courts have the authority and jurisdiction to issue injunctions to prevent low flying aircraft from interfering with the use and enjoyment of land by its owners. The Court further finds that Steven Broussard is the owner is [sic] real property in the southwest corner of Calcasieu Parish that is well suited for water fowl hunting, which was a primary motivation in Broussard's purchase of the property. Richard is a lessee of properties that lie in part to the west, south, and east of Broussard's property. Richard, at times, access [sic] his property by helicopter and uses it to patrol his property for trespassers and at times to transport equipment and/or personnel. Richard further uses a camp that lies to the west of Broussard's property as headquarters for his hunting operations on the involved properties; Richard's camp lies approximately ⅜ of a mile south of Broussard's north property line and approximately ½ mile north of Broussard's south property line.

Helicopters owned or under the control of J. R. Richard have at times flown excessively low to the property owned by Broussard. Some of the low helicopter flights over Broussard's property have occurred during water fowl season. Helicopters, especially low flying ones, are particularly noisy and scare water fowl to an extent that it can cause them to leave an area. The low flying helicopter flights serve no legitimate purpose and resulted in water fowl being unnecessarily scared off of Broussard's property. The Court further finds from the facts in evidence that Mr. Broussard has complained in the past to Richard

about the low flying helicopters. The Court finds that the low flying helicopters disturbance and harassment of water fowl constitutes a violation of both federal and state law. There is nothing peculiar about the location of Broussard's property that would cause or require Richard's helicopters to have to fly over Broussard's property at any time. These low flying helicopters of Richard unnecessarily interfere with Broussard's right to use and enjoy his property. The evidence further establishes that J. R. Richard violated the temporary restraining order issued herein on two occasions, for example, one testified by Broussard and videotaped and the other testified to by Max Caldarera. Based on the concession filed herein by Broussard, Richard's helicopters, when flying from the east, would only have to fly either north ¼ of a mile or south approximately ½ of a mile, in order to avoid flying over Broussard's property.

For the foregoing reasons, the Court finds that Broussard is entitled to a permanent injunction prohibiting helicopters flown or controlled by Richard from flying over Broussard's property at altitudes of under 1000 feet during the months of September through the end of water fowl season each year, except the helicopters may fly at altitudes of under 1000 feet so long as they are within ⅛ of a mile of Broussard's northern property line.

At all other times outside the restricted months set forth above, the Court orders that Richard's helicopters may fly across Broussard's property at altitudes under 1000 feet with due regard for wild animals, water fowl, and without unnecessary interference with Broussard's right to use and enjoy his property.

The other issue the Court must address is the plaintiff's claim for right of passage. Part of that claim has already been addressed in a Motion for Summary Judgment that is filed of record. The facts indicate that Steve Broussard owns approximately 2000 acres in the southwest corner of Calcasieu Parish; Edward Stine owned the subject property prior to Broussard. Broussard purchased the subject property in 1993.

Walker Properties owns and leases to J. R. Richard property that lies to the south and east of Broussard's property. A portion of the Walker's properties that lies south of Broussard's property became enclosed in about the year 1953 as a result of the construction of the Brandon Ditch. The subject place of property is bounded on the north by property, on the east by the Brandon Ditch, on the south by the intercoastal Canal, and on the west by Gray Estate Property. This court initially, in Broussard's Motion for Summary Judgment, found that Walker Properties allowed and encouraged the construction of the Brandon Ditch that resulted in the subject property becoming enclosed. This Court previously dismissed Walker Properties claim for a Statutory Right of Passage and granted Broussard's Motion for Summary Judgment. Furthermore, the Court finds that Walker Properties did not establish any document that would be translative of title to the right of passage sought. Walker Properties did not establish any destination of the owner as would be required to establish the right of passage sought. All evidence at the trial put on by Walker Properties dealt with its claim for right of passage via acquisitive prescription. The Court further finds that Walker Properties did not establish any just title in connection with its claim for right of passage via acquisitive prescription.

The facts indicated that Ed Stine died in 1987 and for more than 10 years prior to his death, he leased all surface rights to the subject property, except that Walker Properties had the right to go upon the said property for purposes of inspection and exploration for minerals. The road across Broussard's property that had been used historically to access the property is known as Boat Launch Road.

The subject property owned by Walker Properties and sought to be accessed is comprised almost entirely of an impounded reservoir; Broussard and Gray Estate also own acreage within the reservoir. Boat Launch Road does not access directly to the subject property, but, instead, accesses and ends at the boathouse owned by Broussard in the portion of the reservoir he owns. The Court finds that Walker Properties produced no document granting it a right of way of the subject property. The evidence established that Edward Stine never allowed anyone free and continuous access through his property in order to access the subject property. Edward Stine kept gates locked that were necessary to go through in order to cross his property and access the subject property.

After Edward Stine's death in 1987, Johnny Caldarera and others leased the subject property from Walker Properties for a period of 10 years. While Caldarera accessed the subject property through the property now owned by Broussard, Caldarera was for a two week period of time locked out because of a disagreement with the administrator of the Stine Estate, Warren Dub Stine. The facts further indicate that once Broussard purchased the subject property in 1993, Caldarera was not allowed unlimited, continuing access to the subject property, but instead was restricted from using the road (Boat Launch Road) across Broussard's property to access the subject

property during the hunting season. Walker Louisiana Properties, therefore, has failed to established the just title of 10 years continuous, uninterrupted, peaceful, and unequivocal possession necessary to acquire a right of passage by acquisitive prescription. Therefore the Court orders that the Walker Properties suit for Right of Passage be dismissed at their cost. For the foregoing reasons the Court orders that the Walker Properties suit for Right of Passage should be dismissed at their cost and further orders that the injunctive relief requested by Steven Broussard be granted for the reasons set forth in the opinion attached hereto and made a part of this judgment.

All costs to these proceedings are to be paid by Walker Properties and J. G. Richard. This is a full and final judgment of the issues between the parties.

Signed this 8th day of January, 2001.

/s/ Gregory D. Lyons
GREGORY D. LYONS,
DISTRICT JUDGE

United States Constitution, Art. I, § 8, cl. 3.

CONSTITUTION OF THE UNITED STATES
ARTICLE I – THE CONGRESS
Section 8, Clause 3. Regulation of Commerce

Section 8, Clause 3. Regulation of Commerce

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

United States Constitution, Art. VI, cl. 2

CONSTITUTION OF THE UNITED STATES
ARTICLE VI – DEBTS VALIDATED –
SUPREME LAW OF LAND – OATH OF OFFICE
Clause 2. Supreme Law of Land

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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49 U.S.C. § 40102(a)(30)

UNITED STATES CODE TITLE 49. TRANSPORTATION SUBTITLE VII – AVIATION PROGRAMS PART A – AIR COMMERCE AND SAFETY SUBPART I – GENERAL CHAPTER 401 – GENERAL PROVISIONS § 40102. Definitions

§ 40102. Definitions

(a) General definitions. – In this part –

* * *

(30) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

* * *

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49 U.S.C. § 40103

UNITED STATES CODE ANNOTATED TITLE 49. TRANSPORTATION SUBTITLE VII – AVIATION PROGRAMS PART A – AIR COMMERCE AND SAFETY SUBPART I – GENERAL CHAPTER 401 – GENERAL PROVISIONS § 40103. Sovereignty and use of airspace

§ 40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit. – (1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with

the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) Use of airspace. – (1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for –

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(3) To establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security, the Administrator, in consultation with the Secretary of Defense, shall –

(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and

(B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.

(4) Notwithstanding the military exception in section 553(a)(1) of title 5, subchapter II of chapter 5 of title 5 applies to a regulation prescribed under this subsection.

(c) Foreign aircraft. – A foreign aircraft, not part of the armed forces of a foreign country, may be navigated in the United States as provided in section 41703 of this title.

(d) Aircraft of armed forces of foreign countries. – Aircraft of the armed forces of a foreign country may be navigated in the United States only when authorized by the Secretary of State.

(e) No exclusive rights at certain facilities. – A person does not have an exclusive right to use an air navigation facility on which Government money has been expended. However, providing services at an airport by only one fixed-based operator is not an exclusive right if –

(1) it is unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide the services; and

(2) allowing more than one fixed-based operator to provide the services requires a reduction in space leased under an agreement existing on September 3, 1982, between the operator and the airport.

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49 U.S.C. § 41713

UNITED STATES CODE TITLE 49.
TRANSPORTATION SUBTITLE VII – AVIATION PROGRAMS PART A – AIR COMMERCE AND SAFETY SUBPART II – ECONOMIC REGULATION CHAPTER 417 – OPERATIONS OF CARRIERS SUBCHAPTER I – REQUIREMENTS § 41713.
Preemption of authority over prices, routes, and service

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition. – In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption. – **(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier. –

(A) General rule. – Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered. – Subparagraph (A) –

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1). – This paragraph shall not limit the applicability of paragraph (1).

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49 U.S.C. § 46101

UNITED STATES CODE TITLE 49. TRANSPORTATION SUBTITLE VII – AVIATION PROGRAMS PART A – AIR COMMERCE AND SAFETY SUBPART IV – ENFORCEMENT AND PENALTIES CHAPTER 461 – INVESTIGATIONS AND PROCEEDINGS § 46101. Complaints and investigations

§ 46101. Complaints and investigations

(a) General. – (1) A person may file a complaint in writing with the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) about a person violating this part or a requirement prescribed under this part. Except as provided in subsection (b) of this section, the Secretary, Under Secretary, or Administrator shall investigate the complaint if a reasonable ground appears to the Secretary, Under Secretary, or Administrator for the investigation.

(2) On the initiative of the Secretary, Under Secretary, or Administrator, as appropriate, the Secretary, Under Secretary, or Administrator may conduct an investigation, if a reasonable ground appears to the Secretary, Under Secretary, or Administrator for the investigation, about –

(A) a person violating this part or a requirement prescribed under this part; or

(B) any question that may arise under this part.

(3) The Secretary of Transportation, Under Secretary, or Administrator may dismiss a complaint without a hearing

when the Secretary, Under Secretary, or Administrator is of the opinion that the complaint does not state facts that warrant an investigation or action.

(4) After notice and an opportunity for a hearing and subject to section 40105(b) of this title, the Secretary of Transportation, Under Secretary, or Administrator shall issue an order to compel compliance with this part if the Secretary, Under Secretary, or Administrator finds in an investigation under this subsection that a person is violating this part.

(b) Complaints against members of armed forces. – The Secretary of Transportation, Under Secretary, or Administrator shall refer a complaint against a member of the armed forces of the United States performing official duties to the Secretary of the department concerned for action. Not later than 90 days after receiving the complaint, the Secretary of that department shall inform the Secretary of Transportation, Under Secretary, or Administrator of the action taken on the complaint, including any corrective or disciplinary action taken.

Title 14, Code of Federal Regulations, § 13.1

CODE OF FEDERAL REGULATIONS
TITLE 14 – AERONAUTICS AND SPACE
CHAPTER I – FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER B – PROCEDURAL RULES PART 13 – INVESTIGATIVE AND ENFORCEMENT PROCEDURES
SUBPART A – INVESTIGATIVE PROCEDURES

§ 13.1 Reports of violations.

(a) Any person who knows of a violation of the Federal Aviation Act of 1958, as amended, the Hazardous Materials

Transportation Act relating to the transportation or shipment by air of hazardous materials, the Airport and Airway Development Act of 1970, the Airport and Airway Improvement Act of 1982, the Airport and Airway Improvement Act of 1982 as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987, or any rule, regulation, or order issued thereunder, should report it to appropriate personnel of any FAA regional or district office.

(b) Each report made under this section, together with any other information the FAA may have that is relevant to the matter reported, will be reviewed by FAA personnel to determine the nature and type of any additional investigation or enforcement action the FAA will take.

Title 14, Code of Federal Regulations, § 13.5

CODE OF FEDERAL REGULATIONS
TITLE 14 – AERONAUTICS AND SPACE
CHAPTER I – FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER B – PROCEDURAL RULES
PART 13 – INVESTIGATIVE AND ENFORCEMENT PROCEDURES
SUBPART A – INVESTIGATIVE PROCEDURES
Current through December 3, 2002; 67 FR 71903

§ 13.5 Formal complaints.

(a) Any person may file a complaint with the Administrator with respect to anything done or omitted to be done by any person in contravention of any provision of any Act or of any regulation or order issued under it, as to matters within the jurisdiction of the Administrator. This section does not apply to complaints against the Administrator or

employees of the FAA acting within the scope of their employment.

(b) Complaints filed under this section must –

(1) Be submitted in writing and identified as a complaint filed for the purpose of seeking an appropriate order or other enforcement action;

(2) Be submitted to the Federal Aviation Administration, Office of the Chief Counsel, Attention: Enforcement Docket (AGC-10), 800 Independence Avenue, S.W., Washington, D.C. 20591;

(3) Set forth the name and address, if known, of each person who is the subject of the complaint and, with respect to each person, the specific provisions of the Act or regulation or order that the complainant believes were violated;

(4) Contain a concise but complete statement of the facts relied upon to substantiate each allegation;

(5) State the name, address and telephone number of the person filing the complaint; and

(6) Be signed by the person filing the complaint or a duly authorized representative.

(c) Complaints which do not meet the requirements of paragraph (b) of this section will be considered reports under § 13.1.

(d) Complaints which meet the requirements of paragraph (b) of this section will be docketed and a copy mailed to each person named in the complaint.

(e) Any complaint filed against a member of the Armed Forces of the United States acting in the performance of official duties shall be referred to the Secretary of the Department concerned for action in accordance with the procedures set forth in § 13.21 of this part.

(f) The person named in the complaint shall file an answer within 20 days after service of a copy of the complaint.

(g) After the complaint has been answered or after the allotted time in which to file an answer has expired, the Administrator shall determine if there are reasonable grounds for investigating the complaint.

(h) If the Administrator determines that a complaint does not state facts which warrant an investigation or action, the complaint may be dismissed without a hearing and the reason for the dismissal shall be given, in writing, to the person who filed the complaint and the person named in the complaint.

(i) If the Administrator determines that reasonable grounds exist, an informal investigation may be initiated or an order of investigation may be issued in accordance with Subpart F of this part, or both. Each person named in the complaint shall be advised which official has been delegated the responsibility under § 13.3(b) or (c) for conducting the investigation.

(j) If the investigation substantiates the allegations set forth in the complaint, a notice of proposed order may be issued or other enforcement action taken in accordance with this part.

(k) The complaint and other pleadings and official FAA records relating to the disposition of the complaint are

maintained in current docket form in the Enforcement Docket (AGC-10), Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, S. W., Washington, D. C. 20591. Any interested person may examine any docketed material at that office, at any time after the docket is established, except material that is ordered withheld from the public under applicable law or regulations, and may obtain a photostatic or duplicate copy upon paying the cost of the copy.

Title 14, Code of Federal Regulations, § 91.119

CODE OF FEDERAL REGULATIONS TITLE 14 – AERONAUTICS AND SPACE CHAPTER I – FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION PART 91 – GENERAL OPERATING AND FLIGHT RULES
§ 91.119 Minimum safe altitudes: General.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be

operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

Louisiana Civil Code article 477

WEST'S LOUISIANA STATUTES ANNOTATED,
LOUISIANA CIVIL CODE BOOK II. THINGS AND
THE DIFFERENT MODIFICATIONS OF OWNERSHIP
TITLE II. OWNERSHIP CHAPTER 1.
GENERAL PRINCIPLES Art. 477. Ownership; content

Art. 477. Ownership; content

A. Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.

B. A buyer and occupant of a residence under a bond for deed contract is the owner of the thing for purposes of the homestead exemption granted to other property owners pursuant to Article VII, Section 20(A) of the Constitution of Louisiana. The buyer under a bond for deed contract shall apply for the homestead exemption each year.

Louisiana Civil Code article 490

WEST'S LOUISIANA STATUTES ANNOTATED,
LOUISIANA CIVIL CODE BOOK II. THINGS
AND THE DIFFERENT MODIFICATIONS OF
OWNERSHIP TITLE II. OWNERSHIP CHAPTER 2.
RIGHT OF ACCESSION SECTION 2.
ACCESSION IN RELATION TO IMMOVABLES
Art. 490. Accession above and below the surface

Art. 490. Accession above and below the surface

Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.

No. 02-0960

(2)

FILED
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In The

Supreme Court of the United States

WALKER LOUISIANA PROPERTIES, J. ORAN RICHARD AND GAME MANAGEMENT, INC.,

Petitioners,

v.

STEVEN BROUSSARD,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

STEVEN BROUSSARD'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Trial Court found Steven Broussard, Respondent, purchased property in Southwest Louisiana with a primary motivation of waterfowl (ducks and geese) hunting. The Trial Court noted the property was well suited for that purpose. The Trial Court found helicopters under the control of Petitioners at times flew excessively low over Broussard's property, thereby scaring off waterfowl. The Court found the low helicopter flights served no legitimate purpose. The Court found the low flying helicopters' disturbance and harassment of waterfowl to be a violation of both federal and state law. The Court found there was nothing peculiar about the location of Broussard's property that would cause or require Petitioners' helicopters to fly over Broussard's property at any time. The Court found the low flying helicopters unnecessarily interfered with Broussard's right to use and enjoy his property. The Court first issued a temporary restraining order requiring Petitioners' helicopters fly at a minimum altitude of 1,000 feet over Broussard's property during waterfowl season. After a Merits Trial, a permanent injunction was issued with the added provision that the helicopters may fly at an altitude under 1,000 feet so long as they are within one-eighth mile of Broussard's northern property line. During the Merits Trial, the Court found Petitioners twice violated the temporary restraining order. (App. 11-12.) (All Appendix references are to the Petitioners' Appendix.) Broussard's right to seek damages for these violations was reserved. (V. 3, p. 585, ll. 16-20.)

QUESTION PRESENTED – Continued

Petitioners frame their question in terms of whether or not a State Court has authority and jurisdiction to regulate the use of navigable airspace where no violations of FAA regulations are involved. Throughout their Petition for Writ of Certiorari, Petitioners take the position federal law completely and entirely preempts any right of the states to exercise any jurisdiction in connection with matters involving navigable airspace.

Respondent contends there is in fact no complete preemption, and the Question Presented should be:

> Given this Court has recognized both federal and state takings claims[1] for otherwise legal low overflights, does a State Court have jurisdiction to issue an injunction enjoining a single operator from flying his helicopter(s) at excessively low altitudes for no legitimate purpose other than scaring off waterfowl and thereby interfering with a landowner's right to use and enjoy his property?

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[1] *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962).

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REASONS TO DENY THE WRIT

Petitioners' Application takes issue with factual findings of the Trial Court. Petitioners' Statement of the Case at pages 2-3 of their Application contend Richard must fly low over Broussard's property to make a safe landing approach, however, the Trial Court found no legitmate purpose for the excessively low flights and found there was nothing about the location of Broussard's property that required Richard to fly over it. (App. 11-12.) Next, Petitioners claim helicopters do not scare waterfowl or in any way adversely affect hunting, which is contrary to the Trial Court's finding that the low flying helicopters serve no legitimate purpose other than to scare and harass waterfowl. (App. 11-12.)

The two factual issues raised by Petitioners are not only at the heart of this case, but necessarily mean Petitioners disagree with the trial court's finding that the low flying helicopter interferes with Broussard's right to use and enjoy his property. The Trial Court found Broussard's right to use and enjoy his property was disturbed by the excessively low flying helicopters. (App. 12.)

This Court does not normally exercise its Writ power where factual disputes are involved.

Further, this Court has clearly recognized the right of a property owner to pursue a taking claim, federal or state, for damages caused by low flying aircraft even when the flights are otherwise legal.[2] The FAA Savings

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[2] *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962).

Clause[3] reserves existing civil remedies to claimants. It is reasonable to allow injunctive relief under the limited circumstances of this case where the excessively low helicopter flights serve no legitimate purpose other than to scare and harass waterfowl (App. 11-12.) The injunction in no way affects interstate commerce, air travel, airline routes, fares or services. It certainly does not affect Petitioners' right to use Richard's helicopters for legitimate purposes.

Broussard filed a Third Supplemental and Amending Reconventional Demand[4] and alleged:

> "19(a).
>
> As a result of J.O. Richard's actions in flying his helicopters over Steven Broussard's property and scaring waterfowl, Steven Broussard has suffered loss of enjoyment of his property, mental anguish and inconvenience and is entitled to damages therefor."

The parties agreed the damage claim would be tried in a subsequent trial/hearing.[5]

Petitioners' Application does not address Broussard's claim for tort damages, but it is clearly authorized by this Court's decision in *Griggs, supra*.

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[3] § 1106 of the Federal Aviation Act, 49 U.S.C., App. § 1506.

[4] Trial Record, V. 1, p. 104.

[5] V. 3, p. 58, ll. 16-20.

It is respectfully submitted there is nothing about the facts of this case that warrant an exercise of this Court's Writ power.

STATEMENT OF THE CASE

Broussard purchased approximately 2,000 acres of land in Southwest Louisiana in 1993. (V. 3, p. 570, ll. 3-5 and Spec. Warr. Deed, V. 2, pp. 377-384.) Shortly after Broussard's purchase of the property, he began experiencing problems with Richard's helicopters flying excessively low over his property and scaring off waterfowl. (V. 3, p. 570, l. 3, p. 571, l. 13.) Within months after Broussard's purchase of the property, he complained in writing to Richard about the low flying helicopters scaring off waterfowl and resulting in complaints from hunters leasing duck/goose blinds from Broussard. (Broussard's 6/17/94 letter, v. 2, p. 356.) Broussard again complained in writing to Richard about the low flying helicopters by letter dated November 20, 1997. (V. 2, p. 339.) The low flying helicopters were an ongoing problem until Richard agreed as part of a 1999 Road Use Agreement to voluntarily restrict his helicopter flights over Broussard's property. (V. 2, pp. 353-355 and pp. 476-477.) In the agreement, Richard agreed not to fly over Broussard's property during hunting season at altitudes under 1,000 feet. (Interestingly, Richard's agreement not to fly his helicopters under 1,000 feet during hunting season comports precisely with the injunction of which Richard now complains.)

In the Road Use Agreement, Broussard gave Richard permission to use roads on Broussard's property in order to access adjacent land Richard leased for hunting. Part of

the Road Use Agreement required Richard provide road maintenance. Richard refused to provide road maintenance as required in the agreement. Broussard complained in writing and orally to Richard regarding Richard's failure to provide road maintenance. Finally, after two years[6] of complaining to no avail, Broussard terminated Richard's road use by locking the gates in January, 1999. (V. 2, p. 423, ll. 4-9 and Broussard's letter, p. 295.)

Once Broussard denied Richard access across his property, the problem with the low flying helicopters soon returned. (Broussard's letter, V. 2, p. 279.)

Nathan Wright, a commercial hunter who leased a hunting blind from Broussard, testified as to having seen Richard's helicopters fly low over Broussard's property many times. Wright testified the helicopters appeared to be flying in such a manner as to drive or scare waterfowl off of Broussard's property with the obvious hope they would go to Richard's neighboring property. (V. 3, p. 563, l. 19 – p. 566, l. 8.)

Petitioners' Application at page 2, paragraph 1, states: "Petitioners must fly reasonably low over the Respondent's adjacent property to make a safe approach to land." The Trial Court found otherwise, wherein it stated: "There is nothing peculiar about the location of Broussard's property that would cause or require Richard's helicopters to fly over Broussard's property at any time." (App. 12.) Petitioners' statement must also be weighed against the fact

[6] Richard was orally allowed to use the road before execution of the Road Use Agreement provided he provided road maintenance.

that Richard voluntarily agreed in the Road Use Agreement to restrict his helicopters to a minimum altitude of 1,000 feet during waterfowl season. Richard abided by the voluntary restrictions until Broussard changed the locks on his road gates because Richard refused to maintain the roads.

At page 3 of his Application, footnote 1, Petitioners state "The overwhelming weight of the testimony indicated that the helicopters did not unduly frighten the waterfowl or in anyway adversely affect hunting on the property." Again, Petitioners are arguing the Trial Court abused its discretion in making a factual finding. The Trial Court specifically found "Helicopters, especially low flying ones, are particularly noisy and scare waterfowl to an extent that it can cause them to leave an area. The low flying helicopter flights serve no legitimate purpose and resulted in waterfowl being unnecessarily scared off Broussard's property." (App. 11.) Because Petitioners are contesting an important factual finding of the Trial Court, Respondent cites the following testimony which supports the Trial Court's factual finding, to-wit: Nathan Wright (V. 3, p. 563, l. 19 – p. 565, l. 25), Steven Broussard (V. 3, p. 569, l. 20 – p. 570, l. 32; p. 583, l. 16 – p. 584, l. 2), and Max Caldarera (V. 3, p. 511, l. 23 – p. 512, l. 12; p. 520, l. 25 – p. 522, l. 5.) Even Richard agreed his helicopters make a lot of noise and scare ducks and geese off the water and ground. (V. 2, p. 487, l. 13 – p. 490, l. 12.) Richard even admitted geese are more sensitive to the noise of a helicopter than ducks. (V. 3, p. 651, l. 29 – p. 652, l. 9.) Even Richard's witness, David Richard, agreed he would rather hunt a blind that did not have helicopter traffic over it. (V. 3, p. 612, ll. 9-28.) Jay Duhon (V. 3, p. 525, l. 17 – p. 526, l. 31.) Donald Vines, a witness for Richard, agreed helicopters scare waterfowl when flying at altitudes between 100

and 150 feet. (V. 3, p. 595, ll. 27-32.) Chad Thieland, a witness for Richard, has seen helicopters scare waterfowl from one property to another. (V. 3, p. 601, l. 6 – p. 602, l. 7.)

At Trial, Richard acknowledged the U.S. Fish and Wildlife Service prohibits helicopters from flying over game reserves at altitudes under 1,000 feet. (V. 2, p. 482.) The reason, because low flying helicopters scare wildlife.

The Trial Court found Richard had in fact violated the temporary restraining order on at least two occasions. (App. 12.) As noted by the Court, one of the violations was videotaped. The videotape was introduced into evidence. The following two photographs are still shots from the videotape.

Photo No. 1

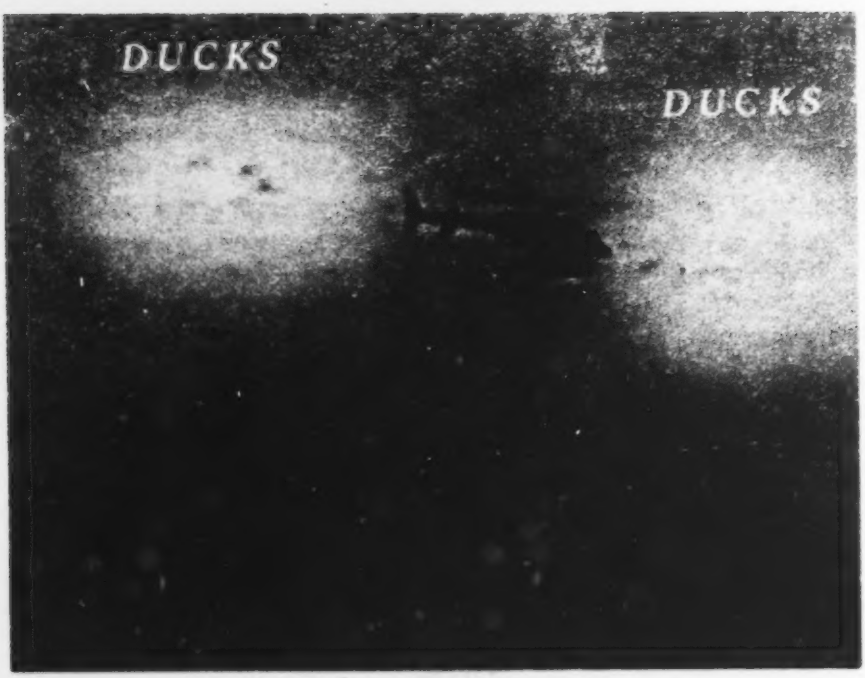

Photo No. 2

In photograph number 1, the helicopter is seen to be flying just above the surrounding trees. While it is difficult to clearly capture the image of ducks in a still shot from a videotape, photograph number 2 depicts ducks flying up around Richard's helicopter. The ducks are much more easily identified in the actual videotape. Even Richard admitted he scarred up a lot of ducks as shown in the video. (V. 3, p. 628, ll. 12-15.)

Petitioners' Application, at page 3, paragraph 2, states the waterfowl "is not Mr. Broussard's property." It is not clear whether or not Petitioners are arguing this gives Richard the right to harass and scare the waterfowl off without regard to any potential consequence. If this is Petitioners' position, then they must acknowledge Richard's actions are a violation of Louisiana and federal law as found by the Trial Court. (App. 12.) LA. R.S. 56:648.1 provides in applicable part:

> "No person shall . . . :
>
> (1) Interfere with the lawful taking of a wild animal by a hunter, trapper, or fisherman or interfere with the process of taking, with intent to prevent the taking.
>
> (2) Disturb a wild animal. . . . "

50 C.F.R. § 19.11(A)(2) provides " . . . no person shall use an aircraft to harass any wildlife."

It would defy logic to contend Broussard's right to use and enjoy his property does not include the benefits flowing from wintering waterfowl that frequent his property.

At page 3 of Petitioners' Application, the last sentence of footnote 1 states "Mr. Broussard, however, felt that 'if you scare one bird away, its adverse.'" Petitioners have

attempted to take part of a statement out of context in order to support his position. Following is the complete response from which Petitioners quote only part:

> It has scared birds off. I mean, the whole – the whole idea of hunting – I guess you – I taken some things to their extreme. If I wanted to go hunt – if you could get a lease at a airport right where there's a lot of air traffic and everything, you'd have a terrible hunting place. Well, I got as far away from that as I could. I got a very remote piece of property that's suitable for waterfowl hunting, and some of the birds are being scared away. Now, not all of them, obviously, but I say if you scare one bird away, it's adverse. *But, I mean, I'm not talking about one bird. I'm talking about lots of birds.* (V. 3, p. 182, ll. 16-28.) (emphasis added.)

SUMMARY OF ARGUMENT

At issue is whether a State Court has jurisdiction to enjoin low flying helicopters that serve no legitimate purpose other than to harass and scare waterfowl. Petitioners argue the State Court's actions are in direct conflict with federal law and FAA regulations and, therefore, are invalid due to preemption. Petitioners contend federal law completely preempts state law regarding navigable airspace, control of aircraft in flight, noise control and aviation routes.

Petitioners, at page 22, footnote 8, of their Application states since Richard did not violate any FAA regulations, any complaint by Respondent to the FAA would have been unavailing. Respondent agrees, which is the reason he did

not seek relief pursuant to the administrative procedures of the FAA.

Essentially, Petitioners take the position since Richard was not in violation of any FAA regulations, the law offers no remedy whatsoever to Broussard for the loss of the use and enjoyment of his property.

Contrary to Petitioners' arguments, the Federal Aviation Act does not expressly preempt state damage remedies. To the contrary, § 1106 of the Federal Aviation Act, 49 U.S.C. App. § 1506, provides: "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001), the Court found " . . . the Federal Aviation Act has no civil enforcement provision or any provision allowing a private resident to sue for the property torts of an airline pilot or airport operator. This is seemingly fatal to a claim of complete preemption." (Citations omitted.)

This Court in *Causby, supra,* and *Griggs, supra,* recognized the validity of both federal and state takings claims in connection with low overflights.

In the case at hand, we are dealing with a single operator of helicopters who was found to be flying his helicopters at excessively low altitudes for no legitimate purpose other than to scare off waterfowl. There is no airport involvement. The involved area is rural. There is no burden on interstate commerce. Richard was not

required to change his route of flight, but to merely maintain a minimum altitude of 1,000 feet during waterfowl season if he chose to fly over Broussard's property.

As noted by Petitioners, there is no FAA regulation prescribing a minimum altitude for helicopter flight, but certainly that does not mean a helicopter can be flown excessively low for no legitimate purpose other than to scare waterfowl. The Fifth Amendment of the United States Constitution affords Respondent the right not to be deprived of his property, which certainly includes its use and enjoyment. When you weigh the competing interest of Petitioners and Respondent, it seems the right of Broussard to use and enjoy his property would outweigh any right Richard has to fly his helicopters at excessively low altitudes so as to unnecessarily scare and harass waterfowl.

There is no complete preemption as argued by Petitioners. Petitioners' tortuous interference with Respondent's right to use and enjoy his property is sufficient for a State Court to invoke its powers of injunctive relief under the limited facts of this case. Respondent's claim for tort damages is still pending. (V. 1, p. 104 and V. 3, p. 58, ll. 16-20.)

ARGUMENT AND AUTHORITIES

FAA REGULATIONS PROVIDED NO REMEDY FOR BROUSSARD

While Petitioners argue throughout their Application Respondent should have filed an administrative complaint with the FAA,[7] Petitioners, at page 22 of their Application, footnote 8, acknowledge any complaint to the FAA would have been unavailing because the record did not contain any evidence Richard violated any FAA regulation. In fact, even a violation of FAA regulations would afford Broussard no recourse through the FAA because FAA regulations provide no private right of action for land owners.[8]

Since the FAA provides no recourse for a landowner such as Broussard, the question then becomes "Is other recourse available?"

THERE IS NO COMPLETE PREEMPTION OF STATE REGULATION OF AIRCRAFT NOISE

Beginning at page 15 of his Application, Petitioners argue there can be no state regulation as concerns aircraft noise because the field has been entirely preempted by federal legislation and regulations.

First, the Trial Court in this matter did not order Richard to alter his route of flight, but instead ordered all flights over Broussard's property during waterfowl season

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[7] See Petitioners' Application, pp. 6, 22 and 23.

[8] See *Vorhees, supra*, at 404.

be at altitudes of 1,000 feet or greater unless conducted within one eighth of a mile of Broussard's northern boundary. Specifically, the Trial Court did not order Richard to somehow reduce the noise emitted by his helicopter or change his route or times of flight.

Petitioners, in support of their argument, cites this Court's decision in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); there were four dissents. This Court's decision in *City of Burbank* has not been read by other Courts as requiring complete preemption of all common-law remedies for aircraft noise, e.g., see *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), wherein the Court stated at 472 of its opinion "We overrule *Luedtke*[9] to the extent it holds all common law remedies for airport noise and pollution have been preempted by federal law." The *City of Burbank* case involved an ordinance enacted by the City of Burbank forbidding departures of jet aircraft from a privately-owned airport between 11 p.m. and 7 a.m. This Court noted such curfews could result in increased congestion, cause a loss of efficiency and aggravate the noise problem. The Court noted the ordinance amounted to a regulation that could effect the FAA's entire scheme of regulating air traffic. In the case sub judice, no such potential exists. This case involves limited and peculiar circumstances. There is only one operator involved, the injunction is directed at no one other than Richard, the injunction does not require Richard to change routes or hours of flight, but only limits his

[9] *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

flights to a minimum altitude of 1,000 feet while over Broussard's property during waterfowl season.

Petitioners, at page 15 of their Application, also cite the case of *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2nd Cir. 1968) in support of their argument for total federal preemption of aircraft noise control. Contrary to Petitioners' argument, the *Town of Hempstead* case does not support an argument for total preemption. Hempstead passed an Unnecessary Noise Ordinance seeking to limit operation of certain aircraft within the Town. Compliance with the ordinance would require many aircraft to fly into and out of John F. Kennedy Airport in patterns that would be in large part incompatible with existing traffic patterns and FAA procedures. The Court agreed the ordinance was in direct conflict with valid applicable federal regulation and, therefore, invalid based on federal preemption. ***However***, the Court noted at page 369, footnote 4, "But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; *another noise ordinance might not have that effect.*" (emphasis added.) In the case sub judice, the injunction does not seek to regulate "flight paths or procedures."

THE AIRLINE DEREGULATION ACT (ADD) DOES NOT PREEMPT RESPONDENT'S STATE LAW REMEDIES

Beginning at page 16 of his Application, Petitioners argue the Airline Deregulation Act of 1978 preempts any claim Respondent may have under state law.

This Court held in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), " . . . A state enforcement action

is preempted if it has a connection with, or reference to airline 'rates, routes, or services.'" In the case sub judice, the complained of injunction in no way purports to regulate or has any connection with "airline rates, routes, or services."

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court at page 232 of the opinion, found the ADA does not preempt all state-law-based claims. The Court noted the FAA's saving clause, § 1106, 49 U.S.C. App. § 1506 (preserving "the remedies now existing at common law or by statute"), when read together with the ADA's preemption clause, § 1305(a)(1), stops states from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves an airline dishonored a term the airline itself stipulated. Again, in the case sub judice, there is no state action with respect to rates, routes, or services.

In *Peterson v. Continental Airlines, Inc.*, 970 F.Supp. 246 (S.D. N.Y. 1997), the Court held there is no preemption where a state law's impact on an air carrier's services is tenuous, remote, or peripheral. The Court further noted the ADA does not preempt claims for outrageous conduct that goes beyond the scope of normal aircraft operations.

For claims to be preempted by the ADA, two things must be true: (1) the claim must derive from enactment or enforcement of state law, and (2) the claim must relate to airline rates, routes, or services either by expressly referring to them or by having a significant economic effect upon them. See *Chrissafis v. Continental Airlines, Inc.*, 940 F.Supp. 1292 (N.D. Ill. 1996).

The FAA's Saving Clause, when read with the ADA's preemption clause, should preserve Respondent's right under state law to the use and enjoyment of his property. Whether that right is enforced by injunction and/or a claim for tort damages should be of no consequence so long as the injunction does not seek to impose substantive standards with respect to rates, routes, or services of an airline. There is no impact on Richard's right to use his helicopters for legitimate purposes.

THE LAW DOES PROVIDE RESPONDENT A REMEDY FOR THE LOSS OF USE AND ENJOYMENT OF HIS PROPERTY

The Trial Court found Petitioners' excessively low flying helicopters serve no legitimate purpose and unnecessarily scared waterfowl off Broussard's property, thereby violating Broussard's right to use and enjoy his property.

Petitioners' argument against the State Court jurisdiction goes beyond the claim by Petitioners that the entire field of aviation is entirely preempted by federal law. Petitioners argue the only remedy available to Broussard would have been through the FAA regulations, but since there was no FAA violation, this avenue is closed. Petitioners' position that State Courts have no jurisdiction coupled with Petitioners' acknowledgment that the FAA offers no remedy in this matter leads to but one conclusion, i.e., the law affords Broussard no remedy for the loss of the use and enjoyment of his property. Nowhere in Petitioners' Application is there an acknowledgment that the law offers Broussard recourse for the loss of the use and enjoyment of his property. Essentially, Petitioners take the position that since the helicopter was flying

within the FAA regulations, nothing can be done to protect Broussard's property rights.

As a starting point, the Fifth Amendment of the United States Constitution provides no person shall be deprived of life, liberty or property without due process of law. Respondent asserts the position taken by Petitioners would violate his Fifth Amendment property rights. In determining what constitutes a Fifth Amendment "taking," Courts have relied upon state law.[10]

La. Civ. Code Art. 477 provides in pertinent part:

> "A. Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."

In *Causby, supra*, this Court recognized a Fifth Amendment takings claim based on frequent low overflights by military aircraft. The plaintiffs operated a chicken farm near a municipal airbase that had been leased by the government for use by military aircraft. Plaintiffs had to give up their chicken business as a result of noise from the low overflights that frightened the birds. Plaintiffs claimed the United States had taken an easement over their property, resulting in the value of the property being destroyed. Much like Petitioners in the case sub judice, the United States claimed under the Air Commerce Act as amended by the Civil Aeronautics Act, the United States had complete and exclusive national

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[10] *Causby, supra*, at 266.

sovereignty of the airspace over this country. The government argued because its flights were within the minimum safe altitudes of flight which had been prescribed, they were in exercise of the declared right of travel through airspace.

Beginning at the bottom of page 20 of his Application, Petitioners cites language from *Causby* in support of Petitioners' claim that a private citizen has no right to claim a trespass in the airspace over his property. However, Petitioners neglected to point out limitations on the use of this airspace by the public as noted in *Causby*, page 264, where this Court stated:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere . . . The fact that he does not occupy it in a physical sense – by the erection of buildings and the like – is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.

The Court in *Causby* went on to recognize the plaintiff's claims for loss of use and enjoyment of his property. In so holding, this Court noted "our holding that there was an invasion of Respondent's property is thus not inconsistent with the *local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.*" (*Causby, supra,* p. 266.) (emphasis added.)

Petitioners' Application, at page 21, footnote 6, attempts to "discount" the relevance of the *Causby* decision by stating "no tort action for damages was pursued."

Petitioners, as already noted, are clearly wrong in this assertion. (See Broussard's Supp. Pet., V. 1, p. 104 and agreement to try damages in later proceeding, V. 3, p. 58, ll. 16-20.)

As noted by the Appellate Court below, LA. C.C. Art. 490 provides the ownership of a tract of land carries with it the ownership of everything directly above or under it. The Court recognized the airspace may be used for air traffic at reasonable altitudes. However, the Court noted Richard's operation of his helicopter at excessively low levels interfered with Broussard's right to use and enjoy his land. (App. 8-9.)

LA. C.C.P. Art. 3601 provides an injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant.

LA. C.C.P. Art. 3663 clearly provides injunctive relief is available "to protect or restore possession of immovable property or of a real right therein, is available to: . . .

> (2) A person who is disturbed in the possession which he and his ancestors in title have had for more than a year of immovable property or a real right of which he claims the ownership, the possession *or the enjoyment.*" (emphasis added.)

The Trial Court found Richard's use of his helicopters to harass and scare wildlife constitutes a violation of both federal and state law. LA. R.S. 56:648.1 provides in applicable part:

> "No person shall . . . :
>
> (1) Interfere with the lawful taking of a wild animal by a hunter, trapper, or fisherman or

interfere with the process of taking, with intent to prevent the taking.

(2) Disturb a wild animal. . . . "

50 C.F.R. § 19.11(A)(2) provides " . . . no person shall use an aircraft to harass any wildlife."

Louisiana Courts have made it clear that just because a criminal prosecution may be warranted, this does not prohibit a Court from issuing a civil injunction if the complained of conduct is injurious to property interests. *Connick v. Lucky Pierre's*, 331 So.2d 431 (La. 1976).

If the conduct sought to be enjoined is a violation of law, then the party seeking the injunction is relieved of the obligation of proving irreparable injury. *Smith v. W. Virginia Oil & Gas Co.*, 365 So.2d 269 (La. App. 2d Cir. 1978); writ granted on other grounds, and *Hughes v. Muckelroy*, 97-0618 (La. App. 1st Cir. 9/23/97), 700 So.2d 995.

This Court, in *Griggs, supra,* recognized the validity of a State Court action for taking under the 14th Amendment of the United States Constitution for low overflights.

The *Causby* and *Griggs* decisions make it clear there are limitations upon the activities of aircraft flying within "navigable airspace" that can result in civil remedies (federal or state). In the case sub judice, because Petitioners' excessively low flying helicopters over Broussard's

property served no legitimate purpose;[11] Broussard sought injunctive relief as well as tort damages.

In *Smith v. United Airlines*, No. 00 C 50373, 2002 WL 31236392 (N.D. Ill. Oct. 3, 2002), the issue was whether or not a state law negligence claim arising from an airline passenger being struck by falling luggage was completely preempted by the Federal Aviation Act (FAA) and Airline Deregulation Act (ADA). The Court noted the FAA lacked any civil enforcement provisions that would allow a private citizen to sue for personal injury. The Court found neither the FAA nor the ADA affords a complete preemption of state law claims. Plaintiff was allowed to pursue his negligence claims in state court.

In the case of *Town of East Haven v. Eastern Airlines, Inc.*, 470 F.2d 148 (2nd Cir. 1972), the Court recognized plaintiff's right to recover damages for diminution of plaintiff's property value as a result of low overflights to and from nearby airports. The fact that the flights were legal did not effect plaintiff's rights to recover.

Likewise, the Supreme Court of Texas in *City of Austin v. Travis County Landfill Company, L.L.C.*, 73 S.W.3d 234 (TX 2002), recognized the right of citizens to pursue state law claims for compensation as a result of loss of use of enjoyment of their property due to low overflights.

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[11] The Trial Court specifically found Richard's excessively low flying helicopters served no legitimate purpose and resulted in waterfowl being unnecessarily scared off of Broussard's property. (App. 11.)

In *Erie Municipal Airport Authority v. Agostini*, 127 Pa.Cmwlth. 360, 561 A.2d 1281 (1989), the Court recognized claims for "takings" as a result of low overflights.

In *Palm v. United States, Bartleson v. United States, Jones v. United States and Palm v. United States*, 835 F.Supp. 512 (U.S. Dist. Ct. N.D. CA 1993), the Court recognized the right of landowners to pursue federal and state tort claims against the United States based upon exploding projectiles and low overflights from military aircraft.

In *Swetland v. Curtiss Airports Corp.*, 55 F.2d 201 (6th Cir. 1932), the Court held plaintiffs were entitled to enjoin the use of an airport where its operation would seriously interfere with plaintiffs' use of their property.

In *Brenteson Wholesale, Inc. v. Arizona Public Service Company*, 166 Ariz. 519, 803 P.2d 930 (Az. App. 1990), a power company sought an injunction against the owner of an adjacent airport to prohibit use of the airstrip because it interfered with the power company's use of its land (danger of high voltage lines). The Court of Appeal used a balancing test to determine the reasonableness of the interference. The court granted the injunction prohibiting use of the airstrip.

In the case sub judice, a balancing test would compare Broussard's loss of use and enjoyment of his property to the right of Richard to fly his helicopters at "excessively low altitudes for no legitimate purpose."

EQUITY FAVORS PROTECTING BROUSSARD'S PROPERTY RIGHTS VIA INJUNCTIVE RELIEF

This Court in *Causby* and *Griggs* recognized a landowner's right to assert a takings claim (federal or state) for loss of value of plaintiff's property due to low overflights. Damages in these cases were somewhat fixed and subject to a "one time" assessment. The loss of the chicken business in *Causby* was a pecuniary loss readily subject to evaluation. In *Griggs*, the plaintiff's home was deemed not suitable for residential purposes due to airplane noise. The loss to *Griggs* was readily ascertainable by traditional methods.

The factual circumstances of the case at hand do not easily lend themselves to traditional tort damages. Not only would it be difficult to fix damages for any given infraction, but Broussard would be required to file another claim every time Richard decides to scare birds off Broussard's property. Further, there is no way for Broussard to know of all of Richard's flights nor the extent of damage from any low flight not witnessed. The most logical solution is simply to prohibit these low flights that "serve no legitimate purpose." An injunction is a reasonable method to solve the problem. An injunction allows Broussard to exercise his right to use and enjoy his property. An injunction under the facts of this case has *no* effect on interstate commerce, air traffic, airline routes, prices or services. It would be a reasonable interpretation of the FAA's "Saving Clause" to allow for injunctive relief under these limited facts and circumstances. On the other hand, it would seem unreasonable to require Broussard to bring Richard back to Court every time there is a violation; this would result in unnecessary litigation and expense. (Tort victims in

Louisiana cannot recover attorney fees or punitive damages.)

The activity sought to be enjoined has nothing to do with the legal use of Richard's helicopters. None of the activities[12] mentioned at page 2 of Petitioners' Application would be affected, nor does the injunction have any bearing on the "911" policy reasons argued at page 24 of Petitioners' Application.

CONCLUSION

The "bottom line" of Petitioners' arguments is since Richard was not violating any FAA Rules, Broussard has no remedy under any law for the loss of use and enjoyment of his property due to the low overflights. Accepting Petitioners' argument, because Broussard lives in a rural area, Richard is free to hover over Broussard's home at any altitude he chooses so long as he does not endanger persons or property. In fact, if someone is having a political gathering out in the country, a political spy could hover his helicopter 20' over the crowd and the law could offer no recourse so long as there was no danger to persons or property.

Petitioners argue the events of "911" make the case for total federal preemption that much more compelling. But, if you accept Petitioners' argument that only FAA violations can result in a remedy, then even the federal

[12] Petitioners said they use his helicopter to transport hunters, check for poachers, manage cattle, etc.

government could not stop "excessively low helicopter flights that served no legitimate purpose" even if deemed a potential security risk or terrorist threat.

There is no complete preemption as argued by Petitioners. Takings claims, state and federal, have been recognized by this Court. Other Courts, federal and state, have recognized the right of injunctive relief where low overflights interfere with a person's right to use and enjoy his property.

An injunction is a reasonable remedy under the FAA Savings Clause. The injunction herein is directed at one individual under a peculiar and limited circumstance. The enjoined flights were found to serve no legitimate purpose. The injunction does not require Petitioners to change routes, time of flights; it does not affect interstate commerce or regulate airline routes, prices or services.

As discussed in *Peterson, supra*, there should be no preemption under the facts of this case because any impact on Richard's services is tenuous, remote or peripheral. Further, flying a helicopter excessively low for no legitimate purpose other than to scare and harass waterfowl would seem to fit within the *Peterson* court's description of "outrageous conduct" and, hence, no preemption.

Because Petitioners cite important factual findings of the Trial Court as being in error and because the injunction is a reasonable protection of Broussard's property

rights, the facts and circumstances of this case do not warrant an exercise of this Court's Writ power.

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